The fact that the defendant had applied for a month's adjournment did not prevent the Magistrate from giving a week's adjournment and costs of the adjournment to the respondent.

As Bowen L.J. said in *Gardner v. Jay*[2], (at page 58):—

> "'That discretion'—(he was discussing the discretion of the judge as regards mode of trial)—'like other judicial discretions must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it, it will be reviewed."

In my view, this is a case in which the Court of Appeal should interfere with the exercise of a discretion, and I would allow this appeal with costs here and in the Court below and order that the deposit be paid out to the appellant.

Appeal allowed.

Solicitors: *S. Seenivasagam & Sons; N. Sharma.*

WHANG TAR CHOUNG v. KWONG FOONG & CO.

[C. A. (Mathew C.J. (F.M.), Whyatt C.J. (S) and Buhagiar J.) June 30, 1956]

[K. L.—F.M. Civil Appeal No. 47 of 1955]

Trade Marks—Application for registration—Onus—Objection—Discretion of Registrar.

This was an appeal against the decision of Wilson J. reported *sub nomine* **Kwong Foong & Co. v. Whang Tar Choung** at p. 31 *ante*. The Court of Appeal over-ruling that decision,

Held: (1) the onus was upon the applicant to satisfy the Registrar of Trade Marks that his mark should be registered;

(2) where the Registrar was satisfied that there were two identical marks being used by the applicant and the opponent and that registration would be likely to cause confusion, his refusal to register would be justified;

(3) where there was objection the Registrar must satisfy himself that the mark should be registered in accordance with the provisions of the Trade Marks Ordinance. If he was not so satisfied, then he must refuse registration.

Case referred to:—

(1) *Pan Press Publication Ltd.* 65 R.P.C. 193.

CIVIL APPEAL.

D. G. Rawson for the appellants.

J. S. H. Skrine for the respondents.

Mathew C.J. (with whom **Whyatt C.J. (S.)** and **Buhagiar J.** agreed):—This is an appeal from a decision of the High Court reversing a decision of the Registrar of Trade Marks, refusing to register the trade mark of the respondents-applicants. In the final paragraph of his decision the learned Registrar said:—

> "The onus is upon the applicant to satisfy me that his mark should be registered. This he has failed to do. I must therefore decide that the application must be refused."

The point at issue is whether the following statement of the law in the learned Judge's judgment is correct:—

> "In my view, it was for the opponents to satisfy the Registrar that the application ought to be refused, and that the Registrar has approached the consideration of this matter from an entirely wrong angle."

There is also a subsidiary point for decision. If the opponent to the registration of a trade mark fails in his objection, is the applicant automatically entitled to registration?

It is agreed by both parties that the material date to look at is the date of application by the applicant for the registration of his trade mark, and in the present case that date was 15th June, 1952. As was said in the matter of application by *Pan Press Publication Ltd.*[1], at 197:—

> "It is no part of the function of the Registrar or of the Court to take into account events which have happened since the material date, or, taking his or its stand as at that date, to speculate as to the future."

The Registrar was satisfied that there were two nearly identical marks being used by the appellants and the respondents and that the registration would be likely to cause confusion. He therefore rightly refused registration, having in mind the provisions of section 23(1) of the Ordinance.

The respondents have submitted that the evidence supporting the objection related only to matters which occurred after the due date. In my view, the evidence supported the contention that the appellant was using a mark on the due date which was nearly identical with the mark used by the respondents.

I would say that where there is an objection the Registrar none the less must satisfy himself that the mark should be registered in accordance with the provisions of the Ordinance. If he is not so satisfied, then he must refuse registration.

I would allow this appeal with costs and restore the decision of the Registrar.

Appeal allowed.

Solicitors: *Shearn, Delamore & Co.; Bannon & Bailey.*